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ECOCIDE, THE 5TH CRIME AGAINST HUMANITY: ELUSIVE DREAM OR INEVITABLE

REALITY

-Bhavya Aggarwal¹

ABSTRACT

Will the climate change crisis usher the world to its inevitable end? If the intersectionality between environmental devastation and climate change proves one thing, it is that humans have no one but themselves to blame for the ecological catastrophe they are currently facing. Artificial alterations made to the environment in the name of 'development' have left the world facing problems like global warming, ozone layer depletion and exhaustion of non-renewable resources. Even as the entire world stands together to combat these issues, the international judiciary's oversight on this matter has left academics and environment lawyers alike, in utter dismay.

This paper aims to explore whether an international law of ecocide is our last chance to save the world from total annihilation. While environmentalists, lawyers and nations want ecocide to be included as the fifth crime against humanity before the International Criminal Court, passing an ecocide amendment will be no easy feat. This is due to the various complications around the law of ecocide. Is direct intent necessary? Will corporates and States be held criminally liable too? Will an ecocide amendment of this nature realistically accomplish the goal of evading the climate change crisis.

INTRODUCTION

*The world is too much with us; late and soon,
Getting and spending, we lay waste our powers:*

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*Little we see in Nature that is ours;
We have given our hearts away, a sordid boon!
This Sea that bares her bosom to the moon;
The winds that will be howling at all hours,
And are up-gathered now like sleeping flowers;
For this, for everything, we are out of tune.*

-William Wordsworth

Humankind and nature shared a fulfilling relationship of mutual co-existence up until one point. However, evolution of the industrial society replaced this understanding of interdependence with pursuits of materialistic gain. Physical alterations to the environment and interference with the ecosystem in the name of ‘development’ caused ecological harm that was irreversible in nature. While academics may be unable to pin down the exact act of environmental destruction that gave rise to global warming, ozone layer depletion and the climate change crisis; it is safe to say that years of artificial altercations to our planet paved the way for such an ecological catastrophe. When looked at, international judicial bodies have done a monumental job at safeguarding the rights of every citizen that inhabits the Earth. The United Nations, the International Court of Justice and The International Criminal Court among others serve to deliver true quality in justice by way of fundamental human rights. But what about the rights of the Earth? With the climate emergency right on our doorstep, it is time, if not too late, to hold individuals accountable for causing mass destruction to our environment and committing ecocide – the egregious crime of killing our ecosystems.

1. Meaning of Ecocide

Due to the lack of a concrete legal definition for this rather modern concept, we must retrace our steps back to its inception. Historically, ecocide became known in theory due to its links to the Vietnam War, a concept reiterated by the Swedish Prime Minister Olof Palme in 1972 while

addressing the UN Stockholm Conference on the Human Environment.² Scientists at the time associated ecocide with the environmental devastation and human suffering effectuated by the United States military, primarily through the use of substances that were designed to cause harm to plant-based ecosystems in a certain area. Since then, many academics have attempted at conceiving an explanation that would cover the ambit of this term. Professor and biologist, Arthur W. Galston at the Conference on War and National Responsibility asserted that ecocide “denotes various measures of devastation and destruction which have in common that they aim at damaging or destroying the ecology of geographic areas to the detriment of human life, animal life and plant life”³. Another definition was given by Polly Higgins, international environment lawyer-turned-activist who worked tirelessly, for over a decade, towards the recognition of ecocide as an international crime. Her understanding of ecocide through a legal lens included “the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.”⁴

2. Inclusion under the jurisdiction of the International Criminal Court

While these interpretations are fairly comprehensive in order to understand the concept of ecocide, terms like ‘extensive destruction’ and ‘other causes’ happen to have an unrealistically wide scope. Due to the ambiguity in these parameters, it may seem difficult to establish an international crime which holds humans and corporations alike, accountable for altering the environment that causes perennial harm. In order to approach this obstacle, the International Criminal Court (ICC) has formulated a panel of environment lawyers co-chaired by Justice Florence Mumba, a former ICC judge at the Khmer Rouge Tribunal and Phillipe Sands QC from

² Olaf Palme, 1972, *UN Stockholm Conference on the Human Environment*, “The immense destruction brought about by indiscriminate bombing, by large scale use of bulldozers and pesticides is an outrage sometimes described as ecocide, which requires urgent international attention. It is shocking that only preliminary discussions of this matter have been possible so far in the United Nations and at the conferences of the International Committee of the Red Cross, where it has been taken up by my country and others. We fear that the active use of these methods is coupled by a passive resistance to discuss them”.

³ Anja Gauger, et al, *‘Ecocide is the Missing 5th Crime Against Peace’*, UK, Human Rights Consortium, (2012)

⁴ Polly Higgins, et al, *‘Protecting the planet: A proposal for a law of ecocide’*, (2013)

the Matrix Chambers to construct a legal definition of ‘ecocide’ (by early 2021)⁵. Efforts are being made to further accelerate ecocide’s inclusion as a potential fifth crime within the Court’s jurisdiction – alongside genocide, war crimes, crimes against humanity and the crime of aggression.

The timing of such an inclusion to the ICC surely seems momentous and promising, given the distress caused by climate change on soon-to-be submerged small island nations.⁶ While we may agree that an amendment of this nature is a radical idea, indispensable to curb the apparent disaster of climate change; we may pause to wonder if the International Criminal Court is really the appropriate adjudicatory body for environment centric issues. Furthermore, given the powerful intersectionality between ecocide and climate change; unless climate justice is delivered through severe conviction of Heads of State⁷, corporations and other influential players involved in environmental decimation; controlling the climate change crisis seems like a far-fetched dream.

This paper attempts to explore such road bumps in the international legal community’s quest to remit the responsibility from individual countries to punish environmental offenders. We critically assess whether 20 years later, it is finally time for an ecocide amendment to be included in the Rome Statute, and whether the ICC is adequately equipped to criminalize actions that cause imminent and irreversible harm to our ecosystem. The second part of this paper aims at discussing what a potential amendment on ecocide may look like, considering the historical progress and limitations of the UN proposal of 2010 and the ICC’s Office of the Prosecutor’s (OTP) Policy Paper on case selection and prioritization. Finally, the author delves upon the

⁵ Top international lawyers to draft definition of “Ecocide”, STOP ECOCIDE (November 17, 2020), <https://www.stopecocide.earth/press-releases-summary/top-international-lawyers-to-draft-definition-of-ecocide>

⁶ Joseph Foukona, Symposium Exploring the Crime of Ecocide: Climate Change Crisis in the Pacific—What Role Can International Criminal Law Play?, OPINIO JURIS (September 9, 2020), <http://opiniojuris.org/2020/09/23/symposium-exploring-the-crime-of-ecocide-climate-change-crisis-in-the-pacific-what-role-can-international-criminal-law-play/>

⁷ For example, former Ivory Coast President Laurent Gbagbo was tried by the ICC with “Crimes Against Humanity” for post-election violence. Laurent Gbagbo, Former Ivory Coast Leader, Acquitted of Crimes Against Humanity, N.Y. TIMES (January 15, 2019), <https://www.nytimes.com/2019/01/15/world/africa/laurent-gbagbo-ivory-coast-icc.html>

possible solutions to the ecocide amendment that may fast-track its inclusion to The Rome Statute.

I. ECOCIDE AND INTERNATIONAL LAW: A HISTORICAL ANALYSIS

A. *Ecocide and The Rome Statute*

The Rome Statute is the founding treaty that established the International Criminal Court for grave crimes like Genocide, Crimes Against Humanity, War Crimes and Crimes of Aggression.⁸ While there is a pressing need to include ecological devastation within the ambit of the ICC, its decades-long exclusion is no innocent error. The initial drafting of The Rome Statute categorized ecocide as a Crime against Peace which was objected to by the United States, United Kingdom and the Netherlands, following which it was left out of the draft convention. Whether it was because of the opposition cast by such powerful countries, or due to the lack of concrete provisions, the reason why ecocide was excluded from the final treaty is unknown.⁹ Technically, ecocide is encapsulated in The Rome Statute Article 8 (2)(b)(iv)¹⁰ under the purview of war crimes¹¹. On close inspection of the language of the provision, we observe that the conditions precedent to the crime of ecocide namely ‘widespread, long-term and severe’ are exhaustive in nature making the threshold of successful prosecution unattainably high. This implies, that in order to successfully prosecute an environmental offender; the act of environmental obliteration must have met all three prerequisites to the crime of ecocide, namely the act being widespread, long-term and severe. In case, even one condition precedent is absent; the perpetrator may evade his criminal responsibility.

⁸ The Rome Statute is a treaty that established the International Criminal Court. It was adopted on July 17, 1989 and became effective on July 1, 2002. [hereinafter Rome Statute]. The International Criminal Court (ICC) is an international tribunal with jurisdiction to prosecute individuals for crimes against humanity, war crimes, genocide and aggression. The State Parties to The Rome Statute, INTERNATIONAL CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

⁹ Anja Gauger, et al, *‘Ecocide is the Missing 5th Crime Against Peace’*, UK, Human Rights Consortium, (2012)

¹⁰ Rome Statute, Article 8(2)(b)(iv) ‘widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated’.

¹¹ Rome Statute, 1998, Article 8(2)(b)

Secondly, for an ecological destruction to be prosecuted before the ICC, such damage must take place amidst an international armed conflict.¹² Due to the exclusion of all non-wartime activities, pollution, deforestation, oil spill and any other man-made crisis; corporations and States cannot be prosecuted, making the provision for environmental damage redundant.

Finally, the issue of limited jurisdiction of the ICC. The Court serves to prosecute only individual persons¹³ with no personal jurisdiction to prosecute corporations. In the light of this, establishing individual criminal responsibility on company executives without any concrete evidence becomes a serious obstacle. With respect to geographical and temporal jurisdiction, the Court is only authorized to exercise jurisdiction on individuals in the territory of a State Party for crimes that were committed after the inception of the ICC i.e. 1 July, 2002.¹⁴ This causes a serious issue of accountability as many countries including the USA, China and India are not party to the ICC with a number of countries from the African region who have signalled dissent from remaining a State Party to The Rome Statute.

B. Proposal to the UN Law Commission by Polly Higgins

Right after the inclusion of Crimes of Aggression to The Rome Statute in 2010,¹⁵ lawyer environmentalist Polly Higgins submitted a proposal to the UN Law Commission¹⁶ with an ecocide amendment to the Statute covering acts and omissions committed by Heads of State,

¹² Mark A Drumbl, *'International Human Rights, International Humanitarian Law, and Environmental Security: Can The International Criminal Court Bridge The Gaps?'* ILSA Journal of International & Comparative Law, <https://core.ac.uk/download/pdf/51091789.pdf>

¹³ Andrew Clapham, *'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Group'*, Journal of International Criminal Justice, 6/5, (November 2008), 908-910.

¹⁴ Mark Klamberg, *Commentary Rome Statute: Part 2, Articles 11-21*, Oxford University Press, Oxford 2002, pp. 543-552, <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/>

¹⁵ International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6 (June 11, 2010).

¹⁶ Polly Higgins, et al, *'Protecting the Planet: A Proposal For The Law of Ecocide'*, Crime, Law and Social Change- An interdisciplinary Journal ISSN 0925-4994

individuals, corporations and other entities even during peacetime (as opposed to the provision under Article 8(2)(b)(iv)).¹⁷

According to her draft definition of ecocide¹⁸, acts and omissions included all activities which caused widespread or long-term “*ecological, climate or cultural loss*” or “*damage to or destruction of ecosystems and territories*” – without being exhaustive in nature – that tend to severely diminish peaceful enjoyment of ecosystems and territories by inhabitants. The meaning of the terms “widespread, long-term or severe” were endorsed from an existing UN treaty¹⁹ that defines widespread as “*encompassing an area on the scale of several hundred kilometers,*” long-lasting as “*lasting for a period of months, or approximately a season,*” and severe as “*involving serious or significant disruption or harm to human life, natural and economic resources or other assets.*”²⁰

Through her ecocide amendment, Higgins aimed at establishing a “*pre-emptive duty of care*”²¹ that created an obligation on all countries to not harm the planet. The proviso affixed no requirement of criminal intent for the commission of ecocide, making individuals strictly liable for the crime. By removing specific intent, the law made the severity of the conviction solely based on the degree of harm caused. This ensured that corporations could be held liable even in the absence of intention to cause harm. Furthermore, by holding an individual like the head of the company liable rather than the corporate entity; corporations would be under the pressure to resort to clean energy alternatives, scale back on exploitative mining, and abandon soil and water contamination.

¹⁷ *Id.* at 9.

¹⁸ Ecocide Law, MISSION LIFEFORCE, <https://www.missionlifeforce.org/ecocide-law>

¹⁹ Understanding Regarding Article I of the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD)

²⁰ Understanding Relating to Article I Rep. of the Conference of the Comm. on Disarmament, U.N. GAOR, 31st Sess., Supp. No. 27, at 91–92, U.N. Doc. A/31/2 (1976)

²¹ *Id.* at 15

In the pursuit to give ‘rights to our planet Earth’, the ecocide amendment was proposed as a crime against all life and not just human life.²² Therefore, the ambit of ‘inhabitants’ with rights of peaceful enjoyment of their territory included “*indigenous occupants and/or settled communities of a territory consisting of one or more of the following: (i) humans, (ii) animals, fish, birds or insects, (iii) plant species, (iv) other living organisms.*”²³

The amendment proposal of 2010 paved the way for substantial discussion regarding environmental crime in the international sphere. Despite the failure of the International Law Commission’s initiative to include the ecocide amendment at that time; it stirred discussions on interpreting the law in cases that involved illegal exploitation of natural resources, environmental damage and land grabbing with the Policy Paper from the ICC OTP in 2016.

C. ICC Office of the Prosecutor’s 2016 Policy Paper on Case Selection and Prioritization: A step towards the international crime of ecocide

In order to prioritize and put additional focus on criminal activities involving destruction of the environment, land-grabbing and illegal exploitation of resources; the ICC published a policy paper by the Office of the Prosecutor (OTP) in 2016.²⁴ The paper called for various international tribunals along with the ICC to scrutinize the involvement of corporations in environmental obliteration during peacetime. While the Policy Paper did not suggest the inclusion of ecocide as a fifth crime under the jurisdiction of the ICC, it aimed to “*give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal*

²² For the text of proposed model law, see Ecocide Crime, ERADICATING ECOCIDE, <https://eradicatingecocide.com/the-law/the-model-law/>

²³ Anthony J. Colangelo & Peter Hayes (2019) An International Tribunal for the Use of Nuclear Weapons, *Journal for Peace and Nuclear Disarmament*, 2:1, 219-252, DOI: 10.1080/25751654.2019.1624248

²⁴ Donald K Anton, ‘*Adding a green focus: The Office of the Prosecutor of the International Criminal Court highlights the ‘environment’ in case selection and prioritisation*’ (2016), https://www.researchgate.net/publication/311351164_Adding_a_green_focus_The_Office_of_the_Prosecutor_of_the_International_Criminal_Court_highlights_the_'environment'_in_case_selection_and_prioritisation

dispossession of land”²⁵. Thus, cases where environmental obliteration results into a crime against humanity – like the involvement of business and government leaders in the ostensible land-grabbing in Cambodia²⁶ – would be investigated under Article 7 of The Rome Statute.²⁷ Such a provision vastly increases the ambit of investigation, as cases of forced eviction of indigenous population or destruction of an ecosystem generally fall into the broad definition²⁸ of ecocide.

Further, the Prosecutor assured cooperation to States litigating individuals who have violated The Rome Statute as they stated that *“The Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.”*²⁹

The Policy Paper enclosed the criteria based on which it would select cases, namely the gravity of the crime, the offender’s degree of responsibility and the manner of commission with priority being given to the most serious crimes that concern the international community. Through this Policy Paper, environmental damage was made a considerable factor while evaluating the gravity of the crime, by way of the manner of commission and the impact of the crime.³⁰ Although the

²⁵ Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, INT’L CRIM. CT. (2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

²⁶ Chris Arsenault, ‘Cambodian Land Grabs Are ‘Crimes Against Humanity’, Lawyers tell the ICC, THOMAS REUTERS FOUNDATION, <https://www.reuters.com/article/us-foundation-cambodia-landgrabs-idUSKCN0HW1R420141007>

²⁷ Rome Statute, art 7(2)(a), ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’

²⁸ *Id.* at 22

²⁹ Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, INT’L CRIM. CT. (2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

³⁰ See Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, reg. 1.1 (Apr. 23, 2009), 29.2. The gravity of the offence as an element for the court to decide to the admissibility of a case pursuant to Article 17.1 (d) of the Rome Statute, and prosecutor in determining whether to start an investigation under Article 15.3 or Art. 53 of the Rome Statute. For example, Regulation 29 of the OTP Regulations provides generally that, in assessing the gravity

Paper did little to strengthen the ICC's jurisdiction over environmental crime; the inclusion of environmental destruction as a factor for the existing crimes marked an important milestone in recognising ecocide under the ambit of Crimes Against Humanity and maybe even as the missing Crime Against Peace.

Unfortunately, despite the publication of the Policy Paper in 2016, i.e., almost four years ago; the much-anticipated rise in prosecutions due to ecological obliteration, destruction of natural resources or land grabbing (which were coined as aggravating circumstances by the Policy Paper) has been elusive. What is more disappointing is the blatant silence in the OTP regarding the extensive government-led land-grabbing in Cambodia and the 'Lago Agrio Victims' in Ecuador³¹ which failed to qualify for preliminary examinations. Since the publication of the Policy Paper, environmental exploitation has had little impact in delivering convictions for crimes against humanity.³²

II. NEED FOR ECOCIDE TO BE RECOGNISED AS AN INTERNATIONAL CRIME

A. Inadequacy of the current international law

The lack of accountability for ecological devastation in The Rome Statute gives way to state-authorized corporate immunity, under the umbrella of which industries commit calamitous ecocide without the fear of any repercussions.

The only article in the ICC statute that remotely addresses the eco-centric consequences of a crime is Article 8(2)(b)(iv) which requires "*widespread, long-term and severe damage to the environment which would be clearly excessive in relation to the concrete and direct overall*

for the purposes of initiating an investigation, the Prosecutor shall consider inter alia the scale, the nature, the manner of commission, and the impact of potential crimes.

³¹ For example: One of the worst environmental catastrophes involving oil spillage in 4400 square kilometers of the Amazon forest constituting as severe crimes against humanity

³² Bosco Ntaganda's conviction in July 2019: The grounds of conviction involving exploitation of natural resources were dismissed by the Court and he was charged for Crimes Against Humanity for the war crime of pillage related to enemy property

military advantage anticipated”³³ much like Article 20(g) of the ILC Code of Offences against Peace and Security.³⁴ The Statute fails to define the ambit of the ‘damage to the environment’. In reference to other international provisions to expound such parameters, we find that most agreements fail to define ‘environmental damage’ per se³⁵. Due to such failure in outlining the extent of anthropogenic environmental destruction under the Statute, stakeholders disregard the possibility of criminal liability and continue causing irrevocable harm to the environment. Further, Article 8(2)(b)(iv)’s rigidity with regard to environmental destruction ‘only during the course of an international conflict’³⁶ restricts the imposition of criminal liability and recognition of a broader crime of ecocide before the ICC.

The ICC OTP Policy Paper of 2016 aimed at creating significance around ecological obliteration, destruction of natural resources or land grabbing and the role they played in crimes currently punishable under the ICC. However, due to the insubstantial application of the uncodified law, it remains ‘an internal document of the Office, and as such, it does not give rise to legal rights.’³⁷

The strongest proof of non-application of environmental rights is the case of Bosco Ntaganda in the ICC Trial Chamber VI³⁸. The perpetrator was convicted on 18 counts of war crimes and crimes against humanity, while his criminal activities involving illegal exploitation of natural resources in the Democratic Republic of Congo and war crime of pillage of natural resources were dismissed by the Court. Ntaganda was instead charged for the pillage of household goods

³³ Rome Statute, Article 8 (2)(b)(iv). (emphasis added)

³⁴ ILC Draft Code of Crimes Against the Peace and Security of Mankind (1996), Article 20 (g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

³⁵ For example, e.g. the 1988 Convention on Regulation of Antarctic Mineral Resources Activities (CRAMRA) (not in force), Article 1(15)).

³⁶ Rosemary Mwanza, “Enhancing Accountability for Environmental Damage under International Law: Ecocide of a Legal Fulfilment of Ecological Integrity”, Melbourne Journal of International Law 19 (2018).

³⁷ Office of the Prosecutor, Policy Paper On Case Selection And Prioritisation, 15 September 2016, https://www.Icc-Cpi.Int/Itemsdocuments/20160915_Otp-Policy_Case-Selection_Eng.Pdf (accessed 20 March 2020).

³⁸ The Prosecutor v. Bosco Ntaganda Situation: Situation in the Democratic Republic of the Congo, Trial Chamber VI, 08 July 2019

and appliances, denoting the underdeveloped jurisprudence between international crime and ecocide. Another case that showcases the inadequate application of environmental obliteration is the ‘Bemba Case’³⁹ where despite the Trial Court having found that the MLC soldiers had committed war crimes of pillaging, the Appeals Chambers reversed the inferior court’s judgement and annulled all charges of crimes against humanity as well as war crimes against the defendant.⁴⁰

Beyond the 2016 Policy Paper and The Rome Statute, the absence of a codified international treaty on pressing environmental issues is another key reason for the non-existence of an international crime against the environment. Fragmented and incomprehensive environmental treaties of the past direct nations to formulate domestic laws to comply with the treaty with no follow-up as to domestic countenance of such laws. With recognition of ecocide as an international crime under the ICC, environmental law will receive fundamental recognition for the very first time, forcing culpable stakeholders to be held criminally accountable for their role as a ‘climate villain.’⁴¹

B. Oncoming climate change crisis

An urgent objective of the inclusion of ecocide as an international crime under the ICC is to curb the precipitous rise of climate change. Article 2(1)(a) of the Paris Agreement recognised the impact of climate change and stated that in order to combat the threat of climate change crisis; the planet needs to reduce its global temperature increase to well below 2 degrees centigrade above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees centigrade above pre-industrial levels.⁴² Despite the exigency of the targets of the Paris Agreements, minor efforts are being taken to meet these objectives. The global temperature

³⁹ Trial Chamber III Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo, 21 March 2016, ICC-01/05-01/08-3343.

⁴⁰ Trial Chamber III Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo, 21 March 2016, ICC-01/05-01/08-3343.

⁴¹ During the climate strike in New York, the image of Darren Woods, the CEO of Exxon Mobil was placed on a 15 feet tall cardboard clutching a bag of fake, bloodied money. The puppet of Woods wore the label “Climate Villain.”

⁴² https://unfccc.int/sites/default/files/english_paris_agreement.pdf

prediction has risen to a total of 5 degrees centigrade which is much higher to the figures contained in the Paris Agreement.⁴³

The trapping of carbon dioxide in the atmosphere which is triggering the rising global temperature will lead to catastrophic rise in sea levels across the planet. This is precisely why soon-to-be submerged small island nations⁴⁴ are front-lining the efforts to pursue the inclusion of ecocide as an international crime; because once the sea-level rises to a calamitous level, these low-lying coastal regions will be the first to become inhabitable.⁴⁵ In order to avoid the subsequent crimes of forced mass migration and crimes against human dignity in the future; inclusion of ecocide to aid the global fight against climate change becomes imperative and urgent.

Experts anticipate the onset of ‘climate wars’ of various kinds with the escalation of climate change. The shift in maritime boundaries due to the rise in sea levels may be the foremost of conflicts as States scrimmage with each other to preserve their resources.⁴⁶ The outset of such conflicts due to resource scarcity can already be seen in Darfur, Sudan.⁴⁷

Various reports from the Intergovernmental Panel on Climate Change (IPCC) show 8-figure death tolls in the coming decades. The previous annual death rate of 400,000 due to climate change linked events, is expected to reach six million by 2030 unless there are drastic shifts made from reliance on fossil fuels that cause emission of hazardous greenhouse gases.

⁴³ Paris Agreement, art 2(a), ‘Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;’

⁴⁴ *Id.* at 5

⁴⁵ Étienne Piguet, Antoine Pécout and Paul De Guchteneire, ‘*Migration and Climate Change*’, Cambridge, Cambridge University Press, (2011), 12-15.

⁴⁶ Joshua Lusthaus, *Shifting Sands: Sea Level Rise, Maritime Boundaries and Inter-State Conflict*, (Published Online, Political Studies Association, (2010), 114-115.

⁴⁷ Joshua Busby, ‘Why Climate Change Matters More than Anything Else’, (Published Online, *Foreign Affairs* Vol. 49, (2018), 52-53.

Another key necessity for making ecocide a crime is to halt financial institutions from funding ecocidal activities solely because ‘it is not an offence’. Establishing ecocide as an international crime will help break-off and re-channel finance from fossil fuel companies to industries engaged in renewing the natural resources of our ecosystem.

In light of such a harrowing reality, initiatives like the Stop Ecocide campaign work in the exclusive direction of making destruction of ecosystems an international crime with significance identical to genocide, crimes against humanity, war crimes and crimes of aggression. This must be done with an aim to right the wrongs of the past decades which allowed damaging industrial activities at the cost of widespread and systematic harm to nature.

C. Moral awakening

In essence, categorizing ecocide as an international crime punishable before the ICC creates a moral imperative for individuals and corporations alike, to not harm the environment. It becomes their duty as an upstanding citizen of the society to enjoy and let their fellow citizens enjoy the peaceful habitation of a certain territory.

Academics like Mark Allen Gray have suggested the need to categorize ecocide as a crime to designate the international community’s moral outrage⁴⁸ towards the plummeting of earth’s natural resources at the hands of negligent violation of human rights.⁴⁹ Just like the moral outrage that paved the way for humanitarian laws after the second world war, Gray states that, *“International intolerance towards environmental destruction increasingly mirrors the moral outrage underlying the Nuremberg Charter and Judgment” that resulted in the formation of new humanitarian laws.*⁵⁰

⁴⁸ Mark Allan Gray, The International Crime of Ecocide, 26 CAL. W. INT’ LL.J. 215, 216 (1996).

⁴⁹ Gray’s formulation of ecocide: “Ecocide is identified on the basis of the deliberate or negligent violation of key state and human rights and according to the following criteria: (1) serious, and extensive or lasting, ecological damage, (2) international consequences, and (3) waste. Thus defined, the seemingly radical concept of ecocide is in fact derivable from principles of international law.

⁵⁰ *Id* at 30.

A punishment for any crime is devised with the aim of it acting like a deterrent for the citizens. By coining ecocide as an international crime, we establish a deterrent to the commission of ecocidal activities, preventing individuals from physically altering the environment in fear of its repercussions.

Recently, the discussion on ecocide has acquired high-profile support from diplomatic and spiritual leaders like Pope Francis, who are inducing an ‘ecological awakening’ among their followers⁵¹, and activists like Greta Thunberg who are garnering support for ecocide to become the fifth category of international crime.⁵² According to these diplomatic leaders, an ecological conversion of this form is imperative for the sake of mankind’s future generations. Initiatives such as this push to retrace and re-examine the unsustainable patterns of demand and supply which cater to the unending human wants at the cost of pillaging our ecosphere. By imposing a duty of care, we make it pertinent for humans to be vigilant about their ecocidal activities and how these contribute in languishing the planet.

III. PROBLEMS WITH THE LAW OF ECOCIDE

A. *Establishing intent with elements like actus reus, mens rea and strict liability*

A major loophole in the formulation of ecocide as an international crime is the absence of an outline of various elements that establish the commission of ecocide. The underdeveloped ambit of these elements, namely actus reus, mens rea and strict liability prevent ecocide from becoming a codified international law. This section circumvents such gaps in the elements associated with the crime of ecocide.

⁵¹ Wesley J. Smith, ‘Pope Supports Classifying ‘Ecocide’ as an International Crime’, NATIONAL REVIEW (September 17, 2020), <https://www.nationalreview.com/corner/pope-supports-classifying-ecocide-as-an-international-crime/>

⁵² Eu Leaders are Called on to #face the Climate Emergency & Support Making Ecocide an International Crime, STOP ECOCIDE (July 16, 2020), <https://www.stopecocide.earth/press-releases-summary/greta-to-eu-leaders-support-making-ecocide-an-international-crime>

1. Actus Reus

It is imperative that a precise threshold is set in place to distinguish the actus reus of ecocidal crimes from conventional environmental offences. Falling back on the existing Article 7 of the Rome Statute to define the severity of ecocidal crimes may be anti-climactic due to the limited definition⁵³. This may rule out devastation activities caused by negligence and ones carried out without a pre-planned criminal intent, for example like in the case of oil spills.

Further, it is crucial that the action which constitutes an ecocidal crime takes into account the scale and severity of the act, and its effect on the environment in order to accelerate preliminary investigations for timely prosecution.⁵⁴ In order to prevent ecocide from being regarded as another '*ultimum remedium*'.⁵⁵ The definition of ecocide should not limit prosecution only for the most heinous crimes against the environment. Unless such emphasis is put in the conceptualization of actus reus, only the most serious incidents of environmental destruction like the Chernobyl nuclear accident, the Bhopal gas tragedy or substantial oil spills⁵⁶ may get recognised acts of ecocide.

Thus, the oncoming terminology of ecocidal activities must not confine itself to the current exhaustive parameters of "*wide-spread, long term and severe damage to natural environment*" as prescribed in Article 8(2)(b)(iv) of the ICC Statute or as under Additional Protocol I of the Geneva Convention to prevent restricting ICC's jurisdiction in trying ecocidal crimes.

⁵³ Rome Statute, art 7, 3 <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

⁵⁴ See Office of the ICC OTP policy paper n.1, at 12.

⁵⁵ See further, Douglas Husak, "The Criminal Law as Last Resort", 24 Oxford Journal of Legal Studies 2 (2004) 207–235.

⁵⁶ This could include, for example, the Torrey Canyon oil spill off the coast of Cornwall, Great Britain in 1967; the Amoco Cadiz spill off the coast of Brittany, France in 1978; and the Exxon Valdez oil spill off the coast of Alaska, United States in 1989.

2. Mens Rea and strict liability

As per the current understanding of ecocide and potential examples cited by the Stop Ecocide Foundation (SEF), ecocidal crimes may range from deliberate military action like the use of Agent Orange and nuclear weapons during the Vietnam war, to human acts of negligence like Fukushima, Chernobyl and the Bhopal gas tragedy. In order to establish the ‘crime’ of ecocide, proving the degree of *mens rea* in cases of environmental offences with no direct intent (like in the case of oil spills or nuclear disasters) may be a serious challenge.⁵⁷ According to Article 30 of the Rome Statute, the existing intent requirement states that “*a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*”⁵⁸ The specific prerequisites requiring the person to ‘engage in the conduct’ and ‘specifically mean to create or be aware of the consequences’ may severely hamper the prosecutions of environmental damage that the ecocide law aims to minimize. In order to address this shortcoming, the Draft Ecocide Act of 2011 proposed to include ecocide as a strict liability offence.⁵⁹ The strict liability standard was more likely to encourage preventive and cautious behaviour by strengthening “the polluter pays” and other precautionary principles.⁶⁰

However, imposing strict liability in criminal law is looked down upon, with little support from the drafters of the current ecocide law. Academics like Allison Danner and Jenny Martinez state that, “*Strict liability, where the defendant need not have any blameworthy mental state, is rare and disfavoured in criminal law.*”⁶¹ With the unattainably high threshold of proving direct intent

⁵⁷ See F. Megret, “International Criminal Law”, in J. Beard and A. Mitchell (eds.), *International Law in Principle* (2009). See also Frederic Megret, “The Case for a General International Crime against the Environment”, in Sebastien Jodoin and Marie-Claire Condonier Segger (eds), *Sustainable Development, International Criminal Justice and Treaty Interpretation* (CUP, 2013)

⁵⁸ Rome Statute, Article 30 https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/Ch_XVIII_10p.pdf

⁵⁹ This proposal appeared in the Draft Ecocide Act (2011), Art. 12. See further, <http://eradicatingecocide.com> (accessed 15 March 2020). See also, Pereira, note. 38.

⁶⁰ Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT’ LL.J. 215, 216 (1996).

⁶¹ Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 147 (2005)

under The Rome Statute, alongside an international environmental law which may not impose strict liability; ecocide may remain a ‘paper tiger’ for prosecution of environmental crimes.⁶²

B. Provisions in The Rome Statute: State versus individual or corporate responsibility

With respect to the categories of individuals to be prosecuted for the crime of ecocide, there are wavering opinions even amongst the drafters of this law. While Justice Mumba categorised responsibility between the state or a particular individual; SEF Chair Jojo Mehta suggested to classify ecocide as a corporate crime. As far as corporate accountability is concerned, the provisions under The Rome Statute do not provide for prosecution against corporate entities, the inclusion of which will require unrealistic amendments to the Statute. On the other hand, Benjamin Ferencz, former Nuremberg Chief Prosecutor firmly believed that for a real-time prosecution of ecocidal crimes, corporate atrocities should be penalized via a specific individual from the corporate entity.

Individual accountability in case of ecocidal crimes committed by corporate entities may be very challenging. In cases involving illegal economic activities that cause environmental obliteration; identifying and assigning liability on a single perpetrator may be difficult, due to the big number of players involved.

With regard to state responsibility for ecocide, in 2001 while the draft proposal of Articles of State Responsibility by the International Law Commission (ILC) specifically suggested criminal responsibility of States for unethical environmental practices, the final version of the 2001 ILC

⁶² For example, the UNEP study reports that wildlife crime is a particularly persistent problem in Africa, Asia and Latin America, where all kinds of species – mammals, birdlife, reptiles and amphibians, insects, and plants – are affected. Asia, North America, and the European Union are common destinations for wildlife trafficking, alongside the Gulf countries for illegal charcoal and illegal gold from African countries. Moreover, countries in Asia are increasingly becoming major consumer markets of a wide range of illegal wildlife resources and products including rare highly valuable wood like rosewood. Another example of serious and illegal harms to the environment committed during peacetime include the 600 tons of caustic soda and petroleum residues were dumped in open-air public waste sites in Abidjan, Ivory Coast, in August 2006.

articles⁶³ merely identified the repercussions for the violation of peremptory norms of international law – keeping these norms ambiguous about environmental crime. Even the various commentaries⁶⁴ by the ILC on the articles of state responsibility – although not exhaustive – do not mention any consequences for environmental harm. The absence of ‘massive pollution’ and ‘environmental catastrophes’ in the final draft of the ILC articles proves the resistance faced by this article from the State Parties of the commission.⁶⁵ This goes to show that the traditional international criminal law may identify individual criminal liability, but criminal responsibility of the state is a development that may or may not surface in the distant future.⁶⁶

C. Ecocide And The Paradox Of ‘Inter-‘ And ‘Trans-Nationality’

With regard to the activities included in ecocide, the views are rather paradoxical. While the SEF lists gold-mining and cobalt extraction as a key issues to be addressed by ecocide, several nations might disregard⁶⁷ the possibility of losing access to natural resources on their sovereign land that have the potential of producing new technologies.

Another issue is of the types of environmental crimes that fall under the ambit of ecocide as an international crime. Apart from environmental crimes that affect more than two nations

⁶³ See 2001 International Law Commission (ILC) Draft Articles on the Responsibility for Internationally Wrongful Acts 48, Report of the ILC to the United Nations General Assembly adopted in the fifty-third session, UN Doc. A/56/10 (2001).

⁶⁴ See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Article 40, commentary 6, at 286.

⁶⁵ Ibid

⁶⁶ See Christian Tomuschat, “International Crimes by States: an Endangered Species?”, in K. Wellens ed., *International Law: Theory and Practice – Essays in Honour of Eric Suy*, Martinus Nijhoff (1998) at 259; Geoff Gilbert, “The Criminal Responsibility of States” 39 *International and Comparative Law Quarterly* 345 (1990). Theodor Meron, “Is International Law Moving Towards Criminalization?” 9 *European Journal of International Law* (1998) at 21.

⁶⁷ For example, Brazilian president Jair Bolsonaro’s comments on deforestation in the Amazon, to the effect that the Brazilian rainforest is sovereign territory and the rest of the world should mind its own business, foreshadows some of the political resistance the concept is likely to face.

(transnational or supranational crimes), does ecocide cover crimes affecting the nation responsible for those activities and its neighbouring state (transboundary environmental crimes)?

International environmental crimes would also comprise of ecocidal activities that affect the ecosphere, therefore including illegal trade of ozone-depleting material⁶⁸, dumping of hazardous wastes⁶⁹, illegal trade and transport of wildlife⁷⁰ among others. It is important that all environmental crimes are criminalized on the international stage in order to create a coherence within nations beyond boundaries that allow for a universal jurisdiction for the trying of such crimes, rather than making it a sovereign issue. This would enable the ICC to prosecute environmental offenders even from countries that have not ratified The Rome Statute. Without the eradication of inter-nationality and trans-nationality, perpetrators that demonstrate blatant unwillingness to curb deforestation, mining of natural resources and more cannot be brought to environmental justice.

D. Whether ICC Is The Appropriate Adjudicating Authority To Prosecute Environmental Crimes

1. Environmental crimes' struggle to remain relevant alongside human rights abuses

The central purpose of the establishment of the ICC was to correct the wrongs of World War 2 and address the perpetrators for the human rights abuses conducted by them.⁷¹ Their purpose has always been to prosecute grave crimes that threaten the *peace, security and well-being* of the world. The biggest success of The Rome Statute till date has been their ability to create a

⁶⁸ Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature 16 September 1987, entry into force 01 January 1989, 1522 UNTS 3.

⁶⁹ Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Other Waste and their Disposal, 1673 UNTS 126. 22 March 1989; 05 May 1992.

⁷⁰ Washington Convention on International Trade in Endangered Species of Fauna and Flora (CITES), 993 UNTS 243, adopted on 03 March 1973; in force 07 January 1975.

⁷¹ Peter Sharp, Note, Prospects for Environmental Liability in the International Criminal Court, 18 VA. ENVTL. L.J. 217 (1999).

framework of laws that prosecutes the conduct prohibited by them. The core crimes have a direct link to the principal goal of safeguarding the peace and security of mankind. However, the same may not be the case with environmental crimes which leads to ecocide getting side-lined among the broad array of international crimes.

Environmental crimes if not curtailed, will lead to the depletion of non-renewable natural resources of our planet. Scarcity of such resources may cause international conflict which may finally endanger the peace and security of people. However, academics like Mark Notaras are not entirely convinced about this assumption⁷² and believe that there might be an alternate result which may not end with a war for resources. Drawing from this notion, it may be safe to say that while the ICC will acknowledge the inclusion of ecocide within The Rome Statute, it may not be disposed to favour anthropogenic activities over human rights abuses.

2. The problem of jurisdiction

According to a recent study by Global Carbon Project, countries that are the biggest polluters on the planet are China, the United States, India and Russia in that order⁷³. Coincidentally, these States are also not parties to The Rome Statute, and by extension outside the jurisdiction of the ICC. While the inclusion of ecocide under The Rome Statute would be a big step forward in curtailing the climate change crisis, its scope would be limited due to ICC's lack of jurisdiction over the key polluters of the world. Without having these participants under the ambit of the ICC, the most notorious environmental offenders stay outside the reach of prosecution.

Secondly, Article 8(2)(b) of The Rome Statute prescribes an exhaustive list of war crimes punishable before the ICC. Violations not enshrined under these provisions stay outside the jurisdiction of Court. With regard to environmental crimes, the only provision that remotely allows for judicial interpretation of ecocidal crimes is Article 8(2)(b)(iv) which includes environmental obliteration as a war crime causing “widespread, long-term and severe damage...

⁷² Mark Notaras, Should Ecocide Be Deemed a Crime against Peace?, OUR WORLD <https://ourworld.unu.edu/en/should-ecocide-be-deemed-a-crime-against-peace> [https://perma.cc/8H35-2NYJ] (last visited Apr. 29, 2019).

⁷³ Top 10 most polluting countries in the world: <https://gulfnews.com/photos/news/who-are-the-worlds-biggest-polluters-1.1572250802844?slide=1>

in relation to the concrete and direct overall military advantage anticipated”. This essentially means that acts of environmental devastation will only be prosecuted when carried out during an international armed conflict. Due to this limited ability and inflexibility of the ICC to prosecute acts of environmental devastation, any jurisprudential development of ecocide under The Rome Statute may not be very effective.

Apart from the shortcomings in the ICC’s geographical and temporal jurisdiction, the Court’s personal jurisdiction also has its limitations. While the Court can confer individual criminal responsibility on “natural persons”⁷⁴, state and corporate criminal responsibility does not fall under the Court’s jurisprudence. The lack of state’s criminal responsibility may be overlooked due to provisions in the Statute that provide for individual heads of state to be prosecuted for “core crimes”⁷⁵.

However, the majority of ecocidal crimes are carried out by corporations during their quest of profit maximization. These acts of ecocide generally take place during times of peace, further removing it from the ambit of Article 8(2)(b)(iv) of the Statute. In such circumstances, the absence of a provision⁷⁶ that holds corporate entities responsible for environmental obliteration limits the application of a law⁷⁷ that aims at curbing the climate change crisis.

⁷⁴ Rome Statute, art. 25 (“The Court shall have jurisdiction over natural persons pursuant to this Statute.”).

⁷⁵ For example, the ICC tried former Ivory Coast President Laurent Gbagbo, with “Crimes Against Humanity” related to post-election violence. He is the first former head of state to stand trial at the ICC, and was acquitted on January 15, 2019. Laurent Gbagbo, Former Ivory Coast Leader, Acquitted of Crimes Against Humanity, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/world/africa/laurent-gbagbo-ivory-coast-icc.html> [https://perma.cc/9W3B-4G5H].

⁷⁶ Although a provision to prosecute “legal persons” was proposed in the draft, the same was not approved: Mohammad Saif-Alden Wattad, Rome Statute & Captain Planet: What Lies Between Crime Against Humanity and the Natural Environment, 19 FORDHAM ENVTL. L. REV. 265, 279 (2009).

⁷⁷ Many believe that such corporate entities can be prosecuted by holding the heads of such corporations accountable under Article 28(b) of the Statute for crimes committed under the individual’s effective authority. Although the Article specifically refers to military commander liability (US v. Yamashita) and may not be applicable in the case of a chief office of a corporate entity.

VI. AUTHOR’S SUGGESTIONS TO THE ONCOMING DRAFT PROPOSAL OF THE ECOCIDE LAW

A. Setting appropriate sanctions in place

The environmental provisions of The Rome Statute bear two limitations that hinder the efficacy of trying perpetrators who commit ecocidal crimes before the ICC. Due to the Statute’s ambit of who can be prosecuted being limited to “natural persons”, and the requirement of environmental crimes to have been committed during an armed conflict between two or more nations; the ICC doesn’t do much to deter environmental desecration. Therefore, an essential alteration to the draft proposal on the ecocide law must include the provision to widen the personal and temporal jurisdiction of the ICC. This may entail assigning criminal liability to States and corporate entities who were previously outside the purview of the international court. Further, as corporate offenders indulge in activities causing environmental obliteration during peacetime, Article 8(2)(b)(iv) of the Statute needs to be altered accordingly to include both peacetime and wartime acts of ecocide.

With regard to the current punishment provision prescribed in The Rome Statute, convictions before the ICC involve sentencing in the form of fines, forfeiture of the proceeds from committing the crime and imprisonment.⁷⁸ Apart from acting as a deterrent for individuals that are committing environmental crimes, the ecocide law also aims at minimizing the harm that is being done to the environment. Keeping this in mind, the author suggests that a mandatory provision in punishments for environmental crimes under the Statute must include the rehabilitation of the environment. Along with accumulating the fines imposed on the perpetrator

⁷⁸ Rome Statute, art 77, ‘1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. 2. In addition to imprisonment, the Court may order: (a) A fine under the criteria provided for in the Rules of Procedure and Evidence; (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

for the benefit of the victims, we must not overlook that the direct victim of environmental crimes is the environment itself.

B. Subsidies in return for obtaining jurisdiction

With the primary polluters of the world not being signatory to The Rome Statute, incorporating ecocide to be tried before the ICC may become anti-climactic due to the Court's jurisdictional limitations. Unless, alternate bases of jurisdictions are devised to bring law-breaking nations under the geographical jurisdiction of the ICC. Subsidies could be granted to States for projects carried out in State Parties of the Statute in return for jurisdiction to examine, scrutinize and – if found in violation – possibly litigate nations who conduct ecocidal activities. Thus, for example if a corporation from India (a non-signatory of The Rome Statute) avails a subsidy for development of a corporate project on the territory of a State Party of The Rome Statute, in case they carry out certain activities involving environmental desecration that violates the ecocide law, they will be well-within the jurisdiction of the ICC to be prosecuted for the ecocidal crime.

This, along with the 'effects approach' which grants jurisdiction to the ICC over non-signatories if the effects of their ecocidal activities are felt on the territory of State Parties would make substantial progress in holding environmental offenders accountable despite their decision to not ratify The Rome Statute.

C. An independent International Environment Court

While inclusion under the purview of the ICC appears to be promising, it comes with its own set of limitations which may not necessarily translate into an optimum environmental law. In order to mitigate the life-threatening advances of climate change, we require a legal mechanism that solely monitors the nations' compliance with the environmental law and standards put into place. The existing international statutes lack the provisions to solve anthropogenic disputes and prosecute environmental crimes. Additionally, due to the lack of a codified environmental law

coupled with few cursory environmental treaties, acts of environmental obliteration that have caused transboundary harm in the past have never been litigated.

Unless there is a concrete mechanism that specializes in studying complex scientific evidence in cases violating environmental law; the severity of harm caused and the degree of punishment to be imposed might never be assessed accurately.

Another key reason for an alternative to the International Criminal Court for the prosecution of environmental crimes is to impose an ‘erga omnes’ obligation in matters that affect the earth’s ecosystem. An adjudicatory authority that imposes its constitution on all; without the prejudice of nations being signatories or not is essential in order to access justice.

The alternative international courts which may be sought to litigate environmental matters may be the International Criminal Court or the International Court of Justice. However, for either courts to provide compulsory geographical jurisdiction, major changes will have to be made to the Statutes that govern these Courts, which might not be an easy feat due to its interminability. Therefore, the creation of an effective tribunal with effective enforcement of nations’ obligations towards the environment will produce real-time progress in warding off climate change.

CONCLUSION

The development of environmental law in the past may be regarded as mediocre at best. While Article 8(2)(b)(iv) comes with the lacuna of criminalizing ‘widespread, long-term and severe damage’ to the environment with an unattainably high threshold of occurring during an international armed conflict; Polly Higgins’ proposed law on ecocide seems unrealistically expansive – effectively making all corporations strictly liable just for running an operation that may generate emissions. Recently, an expert drafting panel headed by Justice Florence Memba and Professor Phillips Sands QC was convened to devise a legal definition for ‘ecocide’ making it a potential contender for being termed as an international crime before the ICC.

However, does ICC’s lack of prosecutors and judges bearing expertise in the field of international environmental law allow for ineffective jurisprudence? Is the ICC really the

appropriate adjudicatory authority to prosecute the crime of ecocide? What about the deficiency of resources required to study scientific evidence that usually surface in an environmental crime?

Incorporating an amendment on ecocide in the pre-existing Statute will be a long-drawn process. After the submission of the draft, in order to be adopted it must be approved with a two-thirds majority vote – that is 122 countries. While no country has an explicit veto power, a process of this stature could take anywhere between three to seven years.

Even with these shortcomings, developing a law that prosecutes ecocide is a progressive idea. It creates a juristic personhood for nature, finally pronouncing that environmental harm is not a victimless act after all. If anything, the biggest victim in all of this is our planet which equally deserves to be compensated. That along with the people suffering due to these acts of environmental obliteration, the planet suffers too. More importantly, it finally bestows ‘rights to the planet’ and makes harming the environment an internationally recognised criminal offence.

As ecocide gathers momentum to accomplish far-reaching reforms and eradicate the biblical notion that man has dominion over nature; nations in the meantime must engage in ‘save-the-world’ activities to curb environmental harm which is leading to climate change.

Irrespective of ecocide becoming an international crime, it is imperative that countries make a conscious effort to strengthen their domestic laws to prosecute environmental harm. In addition to this, creation of biosphere reserves as a new form of protected environmental area may help preserve the ecosphere and promote the importance of healthy nature.

The signing of the Paris Agreement marked a major step forward for mankind in combating the climate change crisis. It specifically addressed the issue of environmental harm, generating initiatives to mitigate climate change, as well as finance and fashion initiatives towards a greener future. However, that is not enough. An important next step for tackling the climate change crisis would be to effectively deter individuals, corporations and nations from negligently causing environmental harm. This is where the categorization for an international crime of ecocide enters the debate. By assigning strict criminal liability for egregious crimes against the environment, we ensure that nations’ commitment towards combating climate change is not a gutless declaration but one with a serious plan of action.